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ALTA BATES SUMMIT MEDICAL CENTER,

8 RUSSELL D. STANTEN, M.D., LEIGH I.G.

IVERSON, M.D., STEVEN A. STANTEN, M.D., and

9 WILLIAM M. ISENBERG, M.D., Ph.D.

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12  
13 COYNESS L. ENNIX, JR., M.D., as an  
14 individual and in his representative capacity  
15 under Business & Professions Code Section  
16 17200 et seq.,

Plaintiff,

17 v.

18 RUSSELL D. STANTEN, M.D., LEIGH I.G.  
19 IVERSON, M.D., STEVEN A. STANTEN,  
20 M.D., WILLIAM M. ISENBERG, M.D.,  
21 Ph.D., ALTA BATES SUMMIT MEDICAL  
22 CENTER and does 1 through 100,

Defendants.

CASE NO. C 07-2486 WHA

**DEFENDANT ALTA BATES  
SUMMIT MEDICAL CENTER'S  
NOTICE OF MOTION AND  
MOTION FOR LEAVE TO FILE A  
MOTION FOR  
RECONSIDERATION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

**JUDGE:** Hon. William H. Alsup

**COMPLAINT FILED:** May 9, 2007

**TRIAL DATE:** June 2, 2008

22 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that, pursuant to Local Rule 7-9(b)(3), Defendant  
24 Alta Bates Summit Medical Center ("ABSMC" or "Defendant") will, and hereby does,  
25 seek leave to file a Motion for Reconsideration of the Court Order Granting In Part And  
26 Denying In Part Motion To Dismiss (the "Order"), which was filed on August 28, 2007.  
27 Specifically, ABSMC respectfully requests that the Court allow briefing on whether it  
28 should reconsider its finding that the anti-SLAPP motion filed by defendants is moot.

1 ABSMC contends that the anti-SLAPP motion is not moot because a request for an  
2 award of attorneys' fees and costs is still pending pursuant to California Code of Civil  
3 Procedure § 425.16(c).

4 Defendant's motion is based upon this Notice of Motion and Motion, the  
5 accompanying Memorandum of Points and Authorities, all pleadings and papers on file  
6 in this action, and such oral argument as may be presented to the Court at the time of  
7 the hearing, if any.

8 DATED: August 31, 2007

Respectfully submitted,

KAUFF McCLAIN & McGUIRE LLP

11 By: /S/  
ALEX HERNAEZ

12  
13 Attorneys for Defendants  
14 ALTA BATES SUMMIT MEDICAL  
15 CENTER; RUSSELL D. STANTEN, M.D.,  
16 LEIGH I.G. IVERSON, M.D., STEVEN A.  
17 STANTEN, M.D., and WILLIAM M.  
18 ISENBERG, M.D., Ph.D.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

ABSMC respectfully requests that the Court allow briefing on whether it should reconsider its finding that the anti-SLAPP motion filed by defendants is moot. See Order at 14:13-14. ABSMC contends that the anti-SLAPP motion is not moot because a request for an award of attorneys' fees and costs is still pending.

**II. ARGUMENT**

**A. Defendants' Moving Papers Expressly Requested An Award Of Attorneys' Fees And Costs.**

On May 30, 2007 Defendants filed two motions: a special motion to strike pursuant to California Code of Civil Procedure § 425.16 ("§ 425.16" or the "anti-SLAPP statute") and a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The motion to strike expressly requested an award of attorneys' fees and costs:

Pursuant to CCP § 425.16(c), Defendants also respectfully request that the Court order Plaintiff to pay to Defendants an amount equal to the attorneys' fees and costs incurred by them to strike any portion of the Complaint.

\* \* \* \*

Pursuant to CCP § 425.16(c), "[i]n any action subject to subdivision (b) [of § 425.16], a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." If Defendants prevail, they will file a motion establishing the amount of fees sought.

See Notice of Special Motion to Strike at 1:12-13; Memorandum of Points and Authorities at 25:10-17.

1           **B.     The Court Dismissed The Claims That Were At Issue In The Motion To**  
2           **Strike And Therefore ABSMC Is A Prevailing Party.**

3           The motion to strike and the motion to dismiss both argued that each of  
4           Plaintiff's state law causes of action were barred by *Westlake Comm. Hosp. v. Los*  
5           *Angeles Superior Ct.*, 17 Cal. 3d 465, 483-84 (1976), which holds that a doctor whose  
6           staff privileges have been restricted as a result of hospital peer review may not sue  
7           without first exhausting his administrative remedies. See Motion to Dismiss at § III(B);  
8           Motion to Strike at § IV(B)(1). The Court found that *Westlake* did in fact bar Plaintiff's  
9           state law causes of action; however in doing so it converted the Motion to Dismiss into a  
10          summary judgment motion and it ruled that the motion to strike was therefore moot.

11          **C.     Subsection (c) Of The Anti-SLAPP Statute Is Applicable Here.**

12          ABSMC respectfully submits that the relevant case law requires a different  
13          result. The anti-SLAPP statute contains a mandatory fee and cost shifting provision:

14                 In any action subject to subdivision (b), a prevailing  
15                 defendant on a special motion to strike shall be entitled to  
16                 recover his or her attorney's fees and costs. If the court finds  
17                 that a special motion to strike is frivolous or is solely intended  
18                 to cause unnecessary delay, the court shall award costs and  
19                 reasonable attorney's fees to a plaintiff prevailing on the  
20                 motion, pursuant to Section 128.5.

21          Cal Code Civ Proc § 425.16(c). The Ninth Circuit Court of Appeals has held that this  
22          subsection is applicable in federal court. See *United States v. Lockheed Missiles &*  
23          *Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999) (holding that subsections (b) and  
24          (c) of the anti-SLAPP statute may be applied to pendant state law claims without running  
25          afoul of Federal Rules 8, 12 and 56). Here, because ABSMC's request for fees does not  
26          conflict with any Federal Rule of Civil Procedure, the Court should apply subsection (c)  
27          as required by *Lockheed Missiles*.

1           **D.    ABSMC Is Entitled To An Award Of Fees And Costs.**

2           The right to obtain an award under subsection (c) is "triggered" by the filing  
3 of a motion to strike. *S.B. Beach Properties v. Berti*, 39 Cal. 4th 374, 381 (2006).  
4 Because of this trigger, the right is not extinguished even if a plaintiff subsequently  
5 dismisses his lawsuit. *eCash Techs., Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1154-  
6 1155 (C. D. Cal. 2000) ("[E]ven though these claims were voluntarily dismissed, this  
7 does not absolve the Defendants of liability for fees and costs incurred by Plaintiff in  
8 striking these counterclaims."); *Garrison v. Baker*, 2000 U.S. App. LEXIS 2833 \*4 (9th  
9 Cir. 2000) (voluntary dismissal will not automatically preclude a later award of attorney's  
10 fees under the anti-SLAPP statute).

11           And this trigger has been applied to allow fee and cost awards in numerous  
12 analogous situations. E.g., *Pfeiffer Venice Properties v. Bernard*, 101 Cal. App. 4th 211,  
13 218 (2002) (defendant who has been sued in violation of his or her free speech rights is  
14 entitled to an award of attorney fees even if the matter has been dismissed prior to the  
15 hearing on that motion); *Moraga-Orinda Fire Protection Dist. v. Weir*, 115 Cal. App. 4th  
16 477, 480 (2004) (resolution of the underlying action on the ground of lack of standing  
17 does not moot a fee request under the anti-SLAPP statute).

18           Here, because ABSMC in fact filed a motion to strike seeking fees under  
19 subsection (c), and because that request does not conflict with any federal rule of civil  
20 procedure, the Court should rule on the request. *White v. Lieberman*, 103 Cal. App. 4th  
21 210 (2002). Indeed, the *White* case is factually indistinguishable from the instant  
22 situation:

23           The trial court ruled that because it sustained Lieberman's  
24 demurrer without leave to amend, his motion to strike White's  
25 complaint was moot. But a defendant who prevails in an anti-  
26 SLAPP motion is entitled to attorney's fees. (§ 425.16, subd.  
27 (c).) The trial court therefore erred in determining that  
28 Lieberman's motion was moot.

1 *Id.* at 220. And other federal courts have followed this approach. For example, in *Whitty*  
 2 *v. First Nationwide Mortg. Corp.*, 2007 U.S. Dist. LEXIS 12988 (S. D. Cal. 2007) the  
 3 Court granted defendant's motion to dismiss "claim eleven" alleging "fraud on the court."  
 4 *Id.* at \*47. Notwithstanding its dispositive ruling on the Fed. R. Civ. P. 12(b)(6) motion,  
 5 the Court also applied § 425.16(c) and found that defendants are "entitled to fees and  
 6 costs based on their motion to strike Plaintiffs' claim for fraud on the court." *Id.* at \*43.

7 Moreover, in *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110-11 (9th  
 8 Cir. 2003) the Ninth Circuit favorably relied on *Pfeiffer* for the proposition that "a trial  
 9 court has jurisdiction to award attorneys' fees to a prevailing defendant whose SLAPP  
 10 motion was not heard solely because the matter was dismissed before defendants  
 11 obtained a ruling on the SLAPP motion." Because defendants triggered their right to  
 12 fees and costs by filing a motion to strike, the granting of a motion to dismiss does not  
 13 extinguish this claim. This is especially true where, as here, the defect in Plaintiff's  
 14 complaint (i.e., his failure to exhaust) was raised in both motions.

15 Without any discussion of the issue, the Court in *Crowe v. County of San*  
 16 *Diego*, 303 F. Supp. 2d 1050, 1065-66 (S. D. Cal. 2004) found that the granting of a  
 17 motion to dismiss mooted a claim for attorneys' fees under the anti-SLAPP statute. This  
 18 case did not consider the foregoing authorities and, in any event, is not binding on this  
 19 Court. In *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 2004 U.S. Dist. LEXIS 15375 (N.  
 20 D. Cal. 2004) the Court held that the filing of a first amended complaint mooted an anti-  
 21 SLAPP motion. This conclusion, held the Court, was required by Fed. R. Civ. P. 15,  
 22 which gave plaintiff the absolute right to amend once as a matter of course. *Id.* at \*11.  
 23 By contrast, as the Ninth Circuit held in *Lockheed Missiles*, there is no "direct collision"  
 24 between § 425.16(c) and the Federal Rules of Civil Procedure. Hence the subsection  
 25 should be applied.<sup>1</sup>

26  
 27 <sup>1</sup> ABSMC also requests that the Court change the word "Defendant" to the word "Plaintiff"  
 28 on page 10, line 1 of the Order.

1 **III. CONCLUSION**

2 Peer review proceedings protect the public health. *Kibler v. Northern Inyo*  
 3 *County Local Hosp. Dist.*, 39 Cal. 4th 192, 200 (2006). Indeed, the process is essential  
 4 to preserving the highest standards of medical practice throughout California. *See id.* at  
 5 199. Because voluntary, candid physician participation in such review is absolutely  
 6 crucial to the system's overall operation, doctors such as Dr. Ennix are affirmatively  
 7 prohibited from the type of collateral attacks alleged in the Complaint. Notwithstanding  
 8 the clear exhaustion requirements set forth in *Westlake*, Plaintiff filed a lawsuit  
 9 nonetheless. ABSMC incurred significant attorneys' fees to defend against this attack.  
 10 Given the Court's ruling that the state law claims are without merit, pursuant to Cal Code  
 11 Civ Proc § 425.16(c) ABSMC is entitled to an award of attorneys' fees and costs.  
 12 ABSMC requests that the Order be amended accordingly *sua sponte* or that the Court  
 13 entertain a formal motion on this issue.

14 DATED: August 31, 2007

Respectfully submitted,

KAUFF McCLAIN & McGUIRE LLP

17 By:           / S /            
 18 ALEX HERNAEZ

19 Attorneys for Defendants  
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